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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)	
	)	
BEEHIVE TELEPHONE COMPANY, INC.	)	CC Docket No. 97-249
BEEHIVE TELEPHONE, INC. NEVADA	)	
	)	
Tariff F.C.C. No. 1	)	Transmittal No. 8

To: Chief, Common Carrier Bureau

DIRECT CASE

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OFFICE OF THE SECRETARY

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DIRECT CASE

Beehive Telephone Company, Inc. ("Beehive Utah") and Beehive Telephone, Inc. Nevada ("Beehive Nevada"), by their attorneys, and pursuant to the order of the Common Carrier Bureau ("Bureau"), *see Beehive Telephone Co., Inc.*, DA 98-502 (Com. Car. Bur. Mar. 13, 1998) ("*Designation Order*"), hereby submit their direct case in the above-captioned proceeding.

Background

The Company

Beehive Utah and Beehive Nevada (collectively "Beehive" or "Company") are both controlled by their founder, Arthur W. Brothers. The Company was established in 1965 to bring the first telephone service to remote villages in Utah and Nevada. For years, Mr. Brothers served as a one-man telephone company (he hired his first full-time employee in 1980). He brought telephone service to sparsely-populated areas using surplus equipment (often by draping old military communications cables along roadside barbed-wire fences). In its first twenty years, Beehive never turned a profit, and Mr. Brothers never drew more than $5,000 a year from the Company.

Beehive's subscribers are in tiny villages scattered throughout parts of nine Utah counties and two counties in Nevada. But for Beehive, most of the Company's customers would not have telephone service today, because Beehive serves areas that no other company is willing to serve.

Beehive's eight service areas are widely-dispersed over territory larger than several eastern states and comparable to an area stretching from Boston to Washington, D.C. To drive via land routes to repair system outages or respond to customer complaints can require Beehive personnel to make a 300-mile trip, mostly over dirt roads, taking two days. Even by air, the most remote parts of Beehive's network are two hours from its headquarters in Wendover, Utah.

The areas served by Beehive include some of the most formidable terrain in the United States. Of Beehive's fourteen central office locations, nine are accessible by paved roads, four by dirt roads, and one by water only. Three central office locations do not have commercial power.

Beehive constructed over 600 route miles of long distance facilities just to reach the center of the fourteen villages it serves. It takes an average of more than one mile of line for Beehive to get the local loop to each customer from their associated central switching center.

Beehive operates exchanges in areas so desolate that residents must drive three hours to the nearest convenience store. From Beehive's Partoun exchange near the West Desert High School (where students make up to a 58-mile trip to attend classes), the closest gas station is one hour away over dirt roads.

The Commission has recognized that "absent the substantial efforts of Beehive there would be no telephone service available to the residents of its operating area." *Beehive Telephone Co., Inc.*, CC Docket No. 78-240, 1986 WL 291504 *7 (Apr. 14, 1986). *See also Silver Beehive Telephone Co., Inc.* v. *Public Service Commission of Utah*, 512 P.2d 1327, 1328 (Utah 1973). Those efforts have been praised by federal and state regulators. For example, in a March 1995 speech in Houston, Texas, then Commissioner Alfred C. Sikes noted that ". . . Utah's diminutive Beehive Telephone Company offers residents in Grouse Creek, Utah advanced and feature-rich communications that rival any offered in the world." 1/ However, the provision of advanced communications under the extraordinary conditions faced by Beehive has been costly.

The Proceeding

On December 17, 1997, Beehive filed Transmittal No. 8, which proposed to revise its interstate access service rates in accordance with the rules promulgated by Commission in *Access Charge Reform*, 12 FCC Rcd 15982 (1997). Pursuant to the exemption set forth in section 61.39(b) of the Commission's Rules ("Rules"), Beehive did not submit supporting data at the time of its tariff filing. *See*

1/ Beehive provides telephones to seven schools. In October 1995, the Utah Educational Association congratulated Beehive for providing free transport to enable schools in the western desert of Utah to have top quality educational television facilities (using 250 miles of fiber optic cable terminating adjacent to the schools).

47 C.F.R. § 61.39(b). 2/

On December 23, 1997, AT&T Corp. ("AT&T") petitioned the Commission to suspend and investigate the tariff filings of over 70 rate-of-return local exchange carriers ("LECs"). *See* Petition of AT&T Corp. on Rate-of-Return LEC Tariff Filings at Appendix A (Dec. 23, 1997). AT&T included Beehive among those LECs that allegedly had filed insufficient cost support. *See id.* at Appendix C. However, it also contended that Beehive "failed to provide supporting documentation with its proposed tariff rate filing". *Id.* at 6. AT&T did not attempt to make the showing required by section 1.773(a)(1)(iii) of the Rules.

AT&T did not serve its petition on undersigned counsel for Beehive until mid-afternoon on Christmas Eve. *See* Letter of Russell D. Lukas to Magalie Roman Salas at 1 (Dec. 29, 1997). That effectively left Beehive with one business day to respond to AT&T's claim.

In its letter response to AT&T, Beehive asked the Commission to disregard AT&T's petition on fairness grounds. *See id.* at 2. It also provided the Commission with detailed cost and demand data for the years 1995 and 1996. *See id.*

The day after receiving Beehive's supporting documentation, the Bureau held that Beehive's "tariff filing provides insufficient

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2/ The Bureau incorrectly stated that sections 61.39(b)(1) and 61.39(b)(3) of the Rules require "cost schedule carriers that make changes to traffic sensitive and common line rates to file cost-of-service studies." *Designation Order* at 2. Supporting data must be submitted at the time of the filing only when end user common line charges are included in the tariff. *See* 47 C.F.R. §§ 61.39(b), 61.39(b)(5). Beehive's tariff does not include end user common line rates.

documentation in support of its proposed rate changes, thereby raising substantial questions of lawfulness." *Tariffs Implementing Access Charge Reform*, DA 97-2724, at 5 (Dec. 30, 1997). The Bureau apparently did not consider Beehive's tariff filing (under section 61.39(b)) to be *prima facie* reasonable. *See Regulation of Small Telephone Companies*, 2 FCC Rcd 3811, 3812-13 (1987); 47 C.F.R. § 1.773(a)(1)(iii). Nor did it specifically address Beehive's cost and demand data.

On January 6, 1998, the Commission issued an order concluding its investigation of Beehive's local switching access rates in CC Docket No. 97-237. *See Beehive Telephone Co., Inc.*, FCC 98-1 (Jan. 6, 1998) ("*Investigation Order*"). On February 5, 1998, Beehive sought reconsideration of that order. *See* Petition for Reconsideration, CC Docket No. 97-237 (Feb. 5, 1998) ("Petition"). Beehive showed that its rates could not be prescribed based on a comparison of its ratio of total operating expenses ("TOE") to total plant in service ("TPIS") to the average TOE to TPIS ratio of LECs serving a comparable number of access lines.

When it designated the issues to be investigated in this proceeding, the Bureau noted the pendency of Beehive's request for reconsideration. *See Designation Order* at 5 nn.19 & 23, 6 n.24. However, the Bureau did not address the adequacy of Beehive's explanations as to high expense levels or its high TOE to TPIS ratio. Rather, it directed Beehive to explain in detail why its TOE to TPIS ratio reflected in Transmittal No. 8 is significantly higher than (1) its ratio in 1994 and 1995 and (2) the ratio among LECs with a similar number of access lines. *Designation Order* at 4.

Finally, although Beehive's access rates were required to be based on its 1995/96 cost data, *see* 47 C.F.R. § 61.39(b)(1)(ii), the Bureau directed Beehive to provide detailed cost data for 1994 as well as for 1995 and 1996. *See id.*

The TOE/TPIS Ratio

The Bureau found that Beehive based its rates in Transmittal No. 8 on a 59.96% TOE/TPIS ratio, which was "significantly higher" than its ratios of 23.55% in 1994 and 24.03% in 1995. *See id.* at 4. *See also Investigation Order* at 7. However, Beehive had a combined 59.96% TOE/TPIS ratio in the years 1995 and 1996, and its 1995/96 ratio is lower than its 1995 ratio.

In its direct case in CC Docket No. 97-237, Beehive submitted a completed Table 1 of FCC ARMIS Report 43-01 ("ARMIS Report") for calendar years 1994, 1995 and 1996. Those ARMIS Reports were also filed in support of Beehive's Transmittal No. 8. They show that Beehive's TOE/TPIS ratio was lower in 1996 (52.86%) than in 1995 (68.19%). The following sets forth Beehive's calculations:

	TOE (Ln. 1190, Col. B)	TPIS (Ln. 1690, Col. B)	TOE/TPIS Ratio
1994	$ 1,451,218	$ 5,245,211	0.2766
1995	$ 3,553,932	$ 5,211,611	0.6819
1996	$ 3,207,674	$ 6,066,006	0.5287
1995/96	$ 6,761,606	$ 11,277,617	0.5995

Beehive's TOE/TPIS ratio appears to have been 27.66% in 1994 and 68.19% in 1995, not 23.55% and 24.03% as the Bureau determined.

Thus, the significant increase in Beehive's TOE/TPIS ratio happened in 1995. Beehive's 1995 ratio was higher because of significant increases in its plant specific and corporate operations expenses.

Beehive's plant specific expenses rose from $340,688 in 1994 to $1,454,407 in 1995, while its corporate operations expenses increased from $675,429 to $1,614,324. Those increases were attributable to Beehive's efforts to stimulate usage of its system and to its involvement in extraordinary litigation.

Beehive anticipated that eventually it would have to operate without the aid of state and federal subsidies. Therefore, Beehive devised two strategies to generate sufficient revenues so that it could provide unsubsidized service to remote locations at low rates. The first was to provide an innovative 800 service. The second was to use conference bridge services, including a chat line, to stimulate traffic, increase minutes of use ("MOUs"), and to decrease the unit cost of service.

In October 1994, Beehive entered into an arrangement with Joy Enterprises, Inc. ("JEI") to provide conference bridge and chat line services. Beehive initially compensated JEI at the rate of $.04 per minute of traffic to the chat line. JEI was paid $224,925 in 1994 and $1,194,088 in 1995. Beehive allocated those costs equally to general purpose computers (Account 6124), digital electronic switching (Account 6212), and to general and administrative (Account 6728).

As a result of the JEI arrangement, Beehive's interstate usage increased substantially in the last quarter of 1994 and totalled

3,328,646 minutes for the year. In order to handle the increased traffic, Beehive leased additional switching equipment from JEI and Dave Goodale in 1995. Consequently, its lease costs increased from $246,601 in 1994 to $796,074 in 1995 (or 54.7% of Beehive's plant specific expenses).

Beehive's legal and accounting costs rose from $557,236 in 1994 to $954,594 in 1995 (or 59% of its corporate operations expenses). Legal expenses totalled $309,224 in 12994 and $727,395 in 1995. The increase in Beehive's legal expenses were related to its efforts to increase its MOUs.

Beehive's plan to market a new 800 service required it to challenge the 800 Service Management System ("SMS/800") before the Commission. *See infra* pp. 17-20. Moreover, Beehive's arrangement with JEI resulted in litigation with AT&T and MCI Telecommunications Corp. ("MCI") before the Commission and a federal district court. *See infra* pp. 26-29. The SMS/800, AT&T and MCI litigation caused Beehive to incur legal expenses that totalled $54,138 in 1995.

Most of the increased legal expenses experienced by Beehive in 1995 resulted from litigation involving the ownership and control of Beehive Utah. Control of Beehive Nevada and its assets were at issue in four state court actions. Beehive incurred legal expenses totalling $554,536 as a result of this "shareholder litigation". Those expenses accounted for 76% of the Company's legal expenses in 1995.

Beehive's TOE decreased from $3,553,932 in 1995 to $3,207,674 in 1996, while its TOE/TPIS ratio dropped from 68.19% to 52.87%.

On January 1, 1996, Beehive agreed to pay JEI $84,000 per month. Consequently, Beehive's costs to lease switching equipment were reduced from $398,037 in 1995 to $336,000 in 1996. And because the stockholder litigation was settled in August 1995, Beehive's legal expenses fell from $727,395 in 1995 to $273,009 in 1996.

The foregoing explains why Beehive's TOE/TPIS ratio was significantly higher in 1995/96 (59.95%) than in 1994 (27.66%). The following explains why Beehive's TOE/TPIS ratio is significantly higher than the ratio among LECS serving between 800 and 1,000 access lines.

Beehive's operating environment differs dramatically from most of the small LECs with a comparable number of access lines. Beehive currently has 588 residential customers, and it serves 284 business lines. To serve its 872 access lines, Beehive has constructed fourteen exchanges and uses a total of 1,180 route miles of transmission lines. *See* Petition at Ex. 3. Thus, Beehive only serves an average of 62 access lines per exchange and less than one access line (0.74) per route mile of cable. That makes Beehive a very high cost LEC.

Beehive recently compared its operations with thirty-seven other LECs which serve between 800 and 1,000 access lines as reported by the Rural Utilities Service ("RUS") of the United States Department of Agriculture. *See id.* at 16 n.9. The 1996 RUS data showed that Beehive is among the lowest density LECs in terms of access lines per exchange and per mile. *See id.*, Ex. 4 at 2. Beehive has more exchanges (14) than the nearest similarly sized LEC (9). Only one of the thirty-seven small LECs served fewer access lines per route mile than Beehive. *See* Petition, Ex. 4 at 2. The following shows how Beehive compares to the average number of exchanges, lines per exchange, and lines per route mile of the other small LECs.

	Beehive	37 LECs
Exchanges	14	2.03
Access Lines Per Exchange	62	450.65
Access Lines Per Route Mile	0.74	5.25

The foregoing analysis suggests that Beehive may be unique among LECs within the Commission's 800-1,000 access line benchmark. Considering the low density of access lines per route mile and per exchanges, Beehive's operating expenses predictably would be higher than most other high cost-per-loop LECs.

Beehive also used NECA's Universal Service Fund ("USF") database to compile a list of the LECs with the highest TOE to TPIS ratios. *See id.*, Ex. 4 at 2. It sorted the NECA USF database on the basis of TPIS per loop and TOE per loop. *See id.* at 3-4. The data confirms that Beehive's TOE to TPIS ratio (50.13%) and its TOE per loop ($3,489) are comparatively high, while its TPIS per loop ($6,959) is low among the sample group. However, Beehive's TOE to TPIS anomaly is explained by the fact that it uses leased switching equipment at four of its exchanges.

Beehive's central office expenses include approximately $28,000 per month in operating lease expense associated with switches deployed in its exchanges. This switch leasing cost is booked as an operating expense rather than as an investment in the TPIS switching account. This choice results in Beehive's expenses being greater, and its TPIS account being lower, than it otherwise would have been. If the switching functionality was purchased and booked as an investment rather than leased, the $28,000 monthly expense would represent the equivalent capital cost of a switching investment of approximately $1.4 million as demonstrated below:

Line		
1	Investment	$1,397,350
2	Depreciation	0.07
3	Rate of Return	0.1125
4	FIT Gross Up	1.515151
5	Total Monthly Capital Cost L.1 x (L.2 + (L.3 x L.4))/12	$28,000

If the data is restated to reflect the acquisition of a switching asset, Beehive's TOE would decrease by $336,000, while its TPIS would increase by $1,397,351. Beehive's TOE to TPIS ratio would be reduced from 50.01% to 36.71%, and its rank among the sample LECs would drop from 12th to 39th. *See* Petition, Ex. 4 at 5.

Beehive lacks specific knowledge as to the operations and plant of other small LECs. Therefore, it cannot explain in detail why its TOE/TPIS ratio is high among such LECs. However, Beehive can suggest that few, if any, LECs confront the operational difficulties it faces.

The fact that Beehive was the only company willing to serve the remote villages in Utah and Nevada suggests how expensive such service has been. [3/] It was that high cost, and the prospect of losing state and federal subsidies, that led Beehive to seek alternative sources of revenue.

Beehive's goal in 1994 with respect to its arrangement with JEI was to increase its minutes of use in order to reduce its unit cost and lower its 1994 $.47 per minute access rate. Because of the JEI arrangement, Beehive has been able to drastically reduce its access charges, as depicted below:

Switched Access Service	1994 ($)	1995 ($)	1997 ($)
Premium Local Transport Facility Per Access Minute Per Mile	0.00358	0.00127	0.00066
Premium Local Transport Termination Per Access Minute	0.1470	0.04768	0.01815
Non-Premium Local Transport Facility Per Access Minute Per Mile	0.00161	0.00054	0.000299
Non-Premium Local Transport Termination Per Access Minute	0.0662	0.02142	0.00817
Premium Local Switching Per Access Minute	0.1540	0.03480	0.04012
Non-Premium Local Switching Per Access Minute	0.0693	0.01566	0.01805

[3/] The Rural Electric Administration ("REA" now RUS) rejected Beehive's initial loan application in 1964 because it felt that the Company did not have the subscriber density necessary for a viable telephone service. Undaunted, Mr. Brothers by himself strung the 30 miles of toll line to allow the Company's first exchange in Grouse Creek to begin commercial operations. Nineteen years after denying Beehive's first loan application, the REA advanced the funds to enable the Company to double its exchanges in rural Utah from three to six.

The expenses Beehive incurred to stimulate traffic were directly related to its switched access services, because the expenditures increased the use of those services and decreased costs to Beehive's customers. For example, in 1994 Beehive's per minute premium access charge for one mile of transport was $.30458. Under Beehive's 1997 tariff rates, that charge had dropped 80.65% to $.05893. Similarly, Beehive's non-premium charge dropped from $.13711 to $.02659. Thus, Beehive's interexchange carrier customers benefited from increased usage at lower access costs.

<u>ARMIS Reports</u>

As directed by the Commission, Beehive is submitting one 3.5 inch computer disk ("disk"), in Lotus Release-3 ("Lotus") format, containing ARMIS Reports for calendar years 1994, 1995, and 1996. *See infra* Exhibit 1. These reports were given to the Commission in three previous filings (once on December 15, 1997 and twice on December 29, 1997).

<u>General Ledger</u>

Exhibit 2 hereto consists of five disks, in Lotus format, which contain Beehive's general ledgers for calendar years 1994, 1995, and 1996.

<u>Subsidiary Records Information</u>

As previously explained in its Motion For Extension of Time, filed April 3, 1998, as a Class B LEC, Beehive is required to maintain subsidiary expense records only if so directed by the Commission. *See* § 32.5999(a)(3). The *Designation Order* directs Beehive for the first time to produce those records. This has resulted in a severe accounting burden to Beehive to produce the requested records. Exhibit 3 consists of one disk, in Lotus format, containing Beehive's subsidiary records information produced thus far. Exhibit 3 includes salaries and wages, benefits, rents and reimbursements for calendar years 1994, 1995, and 1996; and other expenses for calendar years 1994, and 1995 (Beehive Nevada only). Exhibit 3 does not include information related to clearances. Information requested, but not provided, will be submitted as a supplement to Beehive's Direct Case as soon as possible.

Lease Agreement Expenses

Exhibit 4 hereto consists of five lease agreements. Beehive does not have any capital leases.

Legal Expenses

The Commission presumes that all litigation costs (other than those engendered by federal antitrust violations) "arise out of events occurring in the normal course of providing service to ratepayers, and that ratepayers benefit from provision of service." *Accounting for Judgments and Other Costs Associated with Litigation*, 12 FCC Rcd 5112, 5144 (1997) ("*Litigation Costs*"). Beehive is entitled to that presumption. All of its litigation expenses arose out of the ordinary course of business.

Beehive respectfully submits that it should not be required to "explain how interstate access customers benefitted from each of [its] court actions and administrative proceedings". *Designation Order* at 6. The relevant issue is not whether the litigation itself benefitted ratepayers, but whether the litigation arose in the ordinary course of Beehive's business of providing service to ratepayers. *See Litigation Costs*, 12 FCC Rcd at 5144. If so, Beehive's litigation expenses may be booked as a corporate operations expense and recovered from its interstate access customers in accordance with the Parts 36 and 69 separations rules. *See Annual 1991 Access Tariff Filings*, 6 FCC Rcd 3792, 3807 (Com. Car. Bur. 1991).

When it considers Beehive's legal expenses, the Commission must consider the constitutional implications of its actions. Beehive's First Amendment right to petition the government for redress of grievances ensures meaningful access to administrative agencies and the courts. *See California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 513 (1972). Beehive's right of access to the Commission and the courts "encompasses all the means a . . . petitioner might require to get a fair hearing". *Gilmore* v. *Lynch*, 319 F.Supp. 105, 110 (N.D. Cal. 1970), *aff'd sub nom.*, *Younger* v. *Gilmore*, 404 U.S. 15, 92 (1971). One such means that is necessarily involved in the right of access is the opportunity to seek and receive the assistance of an attorney. *Procunier* v. *Martinez*, 416 U.S. 396, 419 (1974). A Commission ruling disallowing legal expenses actually incurred by Beehive in the exercise of its First Amendment right to petition would infringe on that constitutional right.

It also should be noted that the Commission has not promulgated a general rule against which litigation expenses can be judged as reasonable or unreasonable. *See Litigation Costs*, 12 FCC Rcd at 5142-44; *Policy to be Followed in the Allowance of Litigation*

Expenses of Common Carriers in Ratemaking Proceedings, 91 FCC 2d 140, 144-46 (1982). In order to avoid casting a chilling effect on the exercise of a fundamental right, the Commission should employ a standard that accommodates the First Amendment. *See Whelan* v. *Abell*, 48 F.3d 1247, 1257 (D.C. Cir. 1995).

Beehive suggests that the Commission adopt a variation of the "sham exception" to the *Noerr-Pennington* doctrine. [4/] The Commission should disallow expenses incurred by Beehive in petitioning agencies and the courts only if the administrative claim or lawsuit is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits". *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60 (1993). Regardless, the Commission must avoid the void-for-vagueness doctrine (and a due process challenge) by applying a standard that will provide litigants with "real 'intelligible guidance'". *Professional Real Estate*, 508 U.S. at 60 (quoting *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492, 508 n.10 (1988)).

Exhibit 5 hereto is a listing of all legal expenses included in Beehive's general and administrative expense accounts for the years 1994, 1995 and 1996. The following will describe each administrative proceeding and court action for which Beehive incurred legal costs. Where possible, Beehive will identify the legal costs

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4/ *See Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 132 n.6 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965).

it incurred in a particular agency or judicial proceeding. Such specificity is not possible with respect to complex litigation which encompassed multiple, interrelated proceedings in which Beehive was represented by several attorneys or law firms. Litigation expenses in such cases were often invoiced as one matter, which now makes it difficult to apportion the expenses among the interrelated proceedings. Beehive will provide the Commission with the total legal expenses it incurred in such complex litigation.

For ease of reference, Beehive will refer to each litigation matter as it is identified in Exhibit 4. However, that reference should not be construed to reflect the nature of the litigation.

The "Bellcore" Litigation

In March 1994, Beehive filed a formal complaint (File No. E-94-57) against the Bell Operating Companies ("BOCs") alleging that access to the SMS/800 is not subject to tariff regulation under Title II of the Communications Act of 1934, as amended ("Act"). The Commission denied Beehive's complaint in October 1997, and the matter is pending judicial review before the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"). Oral argument in the case is scheduled for October 9, 1998. For the decisions in the SMS/800 complaint case, *see Beehive Telephone, Inc.* v. *The Bell Operating Companies*, 10 FCC Rcd 10562 (1995), *vacated and remanded*, *Beehive Telephone, Inc.* v. *FCC*, No. 95-1479 (D.C. Cir. Dec. 27, 1996), *reinstated*, *Beehive Telephone, Inc.* v. *The Bell Operating Companies*, 12 FCC Rcd 17930 (1997), *petition for review filed*, *Beehive Telephone Co., Inc.* v. *FCC*, No. 97-1662 (D.C.

Cir. Oct. 31, 1997).

As part of its complaint against the BOCs, Beehive challenged the lawfulness of the SMS/800 Functions Tariff, Tariff F.C.C. No. 1 ("SMS/800 Tariff"), and the SMS/800 access rates. In March 1996, Database Service Management, Inc. ("DSMI"), a wholly-owned subsidiary of Bellcore, sued Beehive in the United States District Court for the District of Utah, Central Division ("District Court") for monies allegedly due under the SMS/800 Tariff. *See Database Service Management, Inc.* v. *Beehive Telephone Co., Inc.*, No. 2-96-CV-188-C (C.D. Utah filed Mar. 6, 1996) ("*DSMI*"). Beehive counterclaimed charging DSMI with violations of the Act and the Telecommunications Act of 1996.

Without notice to Beehive, DSMI began disconnecting the Company's 800 numbers in May 1996. Beehive then sought a temporary restraining order and, in June 1996, the District Court ordered DSMI to cease disconnecting Beehive's 800 numbers and to restore 56 such numbers to active status. Whereupon, DSMI filed an interlocutory appeal with the United States Court of Appeals for the Tenth Circuit. *See Database Service Management, Inc.* v. *Beehive Telephone Co., Inc.*, No. 96-4122 (10th Cir. filed Aug. 5, 1996).

The *DSMI* case is still pending. However, after a hearing on March 2, 1998, the District Court issued a bench ruling dismissing all claims and counterclaims, without prejudice. An order directing DSMI to restore Beehive's 800 numbers has been submitted for issuance by the District Court. The effective date of that order will be postponed to allow DSMI to seek a stay pending appeal.

Beehive incurred legal expenses in the SMS/800 litigation which totalled $94,495 in 1994, $28,244 in 1995, and $97,058 in 1996. The expenses directly related to Beehive's provision of 800 service.

Beehive undertook the SMS/800 litigation in order to protect its right to use its block of 800 numbers, all beginning with the prefix "629" or "MAX". Beehive had made a substantial investment in developing its own database to receive and re-route 800-629-XXXX calls. It also invested in creating good will value in its 629 numbers, including the expenditure of funds, research and development, computer programming, engineering effort, customer relations, building competitive marketing strategies, negotiation of contracts, and work before governmental agencies. That investment could be lost if DSMI succeeded in disconnecting Beehive's 800 numbers, or if Beehive ultimately has to pay the exorbitant SMS/800 Tariff rates for SMS/800 access.

If it ultimately succeeds in the SMS/800 litigation, Beehive will be able to provide an innovative 800 service at low cost to its subscribers. Thus, the legal expenses incurred by Beehive in the litigation could substantially benefit ratepayers.

Beehive's litigation costs clearly were not "illegal, duplicative, or unnecessary". *Litigation Costs*, 12 FCC Rcd at 5144 (quoting *NAACP* v. *FPC*, 425 U.S. 662, 668 (1976)). With respect to the costs incurred in the prosecution of Beehive's complaint against the BOCs, it should be noted that Beehive incurred those expenses in the exercise of its statutory right to file its complaint, *see* 47 U.S.C. § 208(a), and its First Amendment right to petition the Commission and the courts. To disallow recovery of Beehive's costs in prosecuting its complaint against the BOCs would seriously impede Beehive's access to the Commission, the D.C. Circuit, and the District Court. Such action would be particularly suspect in light of the fact that the Commission currently is an adverse party to Beehive before the D.C. Circuit.

The AT&T Litigation

In June 1995, AT&T petitioned the Commission to investigate the cost and demand data underlying Beehive's 1995 annual access tariff filing (which reduced Beehive's access rates by 70%). AT&T charged that Beehive's arrangement with JEI was a scheme to "game" the Commission's ratesetting process and to overcharge its IXC customers. The Bureau promptly denied AT&T's petition. *See 1995 Annual Access Tariff Filings of Non-Price Cap Carriers*, 10 FCC Rcd 12231, 12242 (Com. Car. Bur. 1995).

AT&T stopped paying any of Beehive's tariffed access charges in July 1995. AT&T's action had the effect of driving Beehive to the point of insolvency. Accordingly, in December 1995, Beehive filed a lawsuit against AT&T in the District Court to recover unpaid billings for access charges and late fees which totalled $2,353,619. *See Beehive Telephone Company, Inc.* v. *AT&T Corp.*, No. 95-CV-1071W (C.D. Utah filed Dec. 5, 1995).

The District Court stayed Beehive's collection suit in May 1997 to allow the Commission to adjudicate the formal complaint that AT&T had brought against Beehive in October 1996. *See AT&T Corp.* v. *Beehive Telephone Co., Inc.*, File No. E-97-04 (filed Oct. 29, 1996).

That complaint reasserted the same basic claims that AT&T had presented (and the Bureau rejected) in June 1995.

The Bureau consolidated the AT&T complaint with a complaint Beehive brought against AT&T in March 1997. *See Beehive Telephone Co., Inc.* v. *AT&T Corp.*, File No. E-97-14 (filed Mar. 25, 1997). Initial briefs in the consolidated proceeding are due to be filed on April 16, 1998. The District Court stay of Beehive's collection suit against AT&T remains in effect.

The AT&T litigation costs were $10,313 in 1995 and $30,830 in 1996. Beehive's District Court collection suit and its defense of the AT&T complaint were directly related to Beehive's business and the provision of its access services. Clearly, collection suits arise in the normal course of providing service. Under the Commission's current policy, Beehive is allowed to recover its costs to defend AT&T's complaint. *See Litigation Costs*, 12 FCC Rcd at 5134, 5144.

The MCI Litigation

In August 1995, MCI filed a formal complaint alleging that Beehive's access rates were excessive and that the JEI arrangement constituted an unlawful practice. *See MCI Telecommunications Corp.* v. *Beehive Telephone Co., Inc.*, File No. E-95-44 (filed Aug. 29, 1995). Beehive subsequently filed suit against MCI in the District Court seeking payment of tariffed access charges. *See Beehive Telephone Co., Inc.* v. *MCI Telecommunications Corp.*, No. 95-CV-906W (C.D. Utah filed Sept. 29, 1995).

At the encouragement of the Bureau, Beehive and MCI settled their dispute. In March 1996, the Bureau dismissed MCI's complaint with prejudice. *See MCI Telecommunications, Inc.* v. *Beehive Telephone Co., Inc.*, 11 FCC Rcd 2523 (Enf. Div. 1996). The District Court also dismissed Beehive's collection suit against MCI.

During the MCI litigation, Beehive incurred legal fees that totalled $25,719 in 1995 and $42,880 in 1996. Beehive's collection suit and its defense of the MCI complaint were directly related to Beehive's business and the provision of its access services. Such litigation is expected in the ordinary course of a LEC's business. And the Bureau held that the settlement of the MCI dispute would "serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources by the parties and by the Commission." *MCI*, 11 FCC Rcd at 2523.

<u>The Wendover Case</u>

In September 1991, Beehive brought an action in District Court against the Federal Aviation Administration ("FAA") and the City of Wendover to allow Beehive to have access to a heated airplane hangar at the city airport. *See Beehive Telephone Co., Inc.* v. *FAA*, No. 91-CV-1096-G (C.D. Utah filed Sept. 10, 1991). Beehive brought the lawsuit because the City had refused to lease space at the airport so that Beehive could construct a heated hangar. Moreover, the FAA and the City had prevented Beehive from using a hangar it had constructed by terminating its access to the airport runway.

Beehive had three aircraft in 1991, and needed a heated hangar facility to permit stationing the aircraft at Wendover. Beehive's service territory is so large it requires aircraft to repair system outages and respond to customer complaints. However, the temperatures at Wendover are harsh, both in summer and winter, and the potential damage to aircraft avionics from heat and cold require hangaring.

The parties to the Wendover case have stipulated to a resolution which will allow Beehive to lease space at the airport. However, the pending bankruptcy of the City due to its inability to finance completion of airport modernization has left the settlement clouded.

Beehive incurred litigation expenses in the Wendover case that totalled $5,381 in 1994, $3,503 in 1995, and $3,731 in 1996. Those expenditures were made so that Beehive could use aircraft in the ordinary course of business. As Beehive has pointed out, air travel is essential to maintain its service in remote areas. The maintenance of Beehive's service in turn inures to the benefit of its IXC customers by facilitating interexchange service.

<u>The Kolob Mountain Proceeding</u>

In 1991, US WEST protested Beehive's application for a certificate from the Public Service Commission of Utah ("UPSC") to serve the Kolob Mountain area. *See In the Matter of Telephone Service to the Kolob Mountain Area of Washington and Iron Counties, State of Utah*, UPSC Docket No. 91-051-01 (Sept. 10, 1991). Kolob Mountain is located next to Zion National Park in southern Utah, and is an area which had been certificated to US WEST, but which had no telephone service. It is an area where much new home construction had commenced, and which was transitioning from seasonal to year-round residency. Beehive obtained commitments to take service from about 83 residents, although there are about 500 homes and cabins in the area. It has the potential for being the largest exchange on Beehive's network. In addition, there is a summer tourist population of more than 100,000 visitors, who currently have no access to even emergency telephone service in a very rugged area.

In September 1996, the UPSC certificated Beehive to establish service in the Kolob Mountain area.

In order to bring first-time service to the Kolob Mountain area, Beehive incurred legal expenses of $219 in 1994, $6,703 in 1995, and $4,054 in 1996. Beehive undertook the project to bring telephone service to residents and visitors in the Kolob Mountain area. The litigation expenses incurred to obtain UPSC certification were a normal and necessary part of the project. By bringing telephone service to the Kolob Mountain area, Beehive obviously opened a new market for interexchange service.

<u>The Hanksville Litigation</u>

In 1992, Beehive opposed US WEST before the UPSC with respect to the proposed sale of several of its rural telephone exchanges, including its Hanksville exchange, to South Central Utah Telephone Cooperative Association ("SCUTA"). *See In the Matter of the Proposed Sale of the US WEST Hanksville Exchange to South Central Utah Telephone Cooperative Association*, UPSC Docket No. 92-051-02 (Nov. 20, 1992). Beehive had previously been awarded a UPSC certificate to serve Caineville, which is about 15 miles west of Hanksville, and the two areas constitute a single community of interest in a very